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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October term 1971

No. 71-7551

MARIO TARABOCCHIA,

Plaintiff,

-against-

ZIM ISRAEL NAVIGATION CO., LTD.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

MARIO TARABOCCHIA,

Petitioner,

-against-

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner, Mario Tarabocchia, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit rendered after remand from the Supreme Court of the United States, March 31, 1971, which judgment of the United States Court of Appeals for the Second Circuit was entered as a result of its decision dated August 12, 1971, remanding this case to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

OPINIONS OF THE COURTS

The United States District Court for the Southern District of New York, 297 F. Supp. 378, entered judgment from which defendant appealed and plaintiff cross-appealed. The United States Court of Appeals, for the Second Circuit, 417 F. 2d 476, modified in part, affirmed in part and remanded for recomputation of damages. A Petition for Writ of Certiorari was filed (October Term, 1969, No. 1068) and the United States Supreme Court, 401 U.S. 930 granted the writ, vacated the judgment and remanded the case to the Court of Appeals for the Second Circuit for further consideration. The Court of Appeals directed both parties to submit additional briefs, and then in its opinion, set forth infra at page 1a* and reported at 446 F. 2d 1375, remanded the case to the District Court with instructions to dismiss the complaint.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. On remand did the Court of Appeals properly apply this Court's

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* Numerical references followed by "a" are to the appendix included herein.

decision in *Usner v. Luckenback Overseas Corp.*, 400 U.S. 494 to the Facts of this case?

2. Should the warranty of seaworthiness be extended to the loft skid or temporary landing platform on which petitioner was working?

STATEMENT OF THE CASE

Petitioner was discharging cargo from hatch No. 2 of the SS BEERSHEVA, which was moored to Pier 32, North River, New York, at the time of his injury on October 28, 1964. On that date, petitioner was working as a dockman on a skid or temporary landing platform which extended from the loft or second story of Pier 32 North River opposite hatch No. 2 of the SS BEERSHEVA, which vessel was owned and operated by Zim Israel Navigation Co., Ltd.

The skid was held in place against the pier by means of two metal cables attached to its outer edge and then secured to the face of the pier above the skid. The inner edge of the skid rested on the pier loft by means of three metal "shoes" or lips and the skid was secured on its two corners closest to the pier by manila rope. There was a space of about two to three inches between the skid and the pier loft.

Petitioner and his partner, Domenico Morin, were working on the skid helping to land drafts of plywood. The drafts

were removed from the vessel by means of the ship's booms and runners and landed on the skid. The drafts of plywood were lifted by two slings, each sling being placed under one of the ends of the draft of plywood and then the ends of the slings were attached, by means of a loop on each end, to the cargo hook on the end of the runners.

As the drafts of plywood were landed on the skid, petitioner and Morin were unhooking the drafts of plywood from the slings by following the procedure of removing the loop at one end of the sling from the cargo hook, removing the sling from under the draft and holding the end of the sling which they had removed in their hand until the winch operator commenced to take in on the cargo runners and cargo slings.

Petitioner commenced work on the skid at about 2:00 p.m. and the accident occurred between 2:00 and 2:30 p.m. on October 28, 1964.

On the particular occasion of the accident, Morin either dropped his end of the cargo sling or it was pulled from his hand by the winchman, causing the end of his cargo sling to fall into the two to three inch space between the skid and the pier loft and become caught in the space. As a result, the winches taking in on the slings dislodged the skid from the pier loft causing it to fall down, precipitating petitioner to the concrete apron or stringpiece twenty feet below.

Petitioner recovered judgment below. The District Court stated that it was unclear as to whether plaintiff's co-worker dropped his loop into the aforesaid space following the upward thrust of the winch or prior thereto and further stated that the co-worker may have negligently dropped his loop before the winchman took up the slack or the winchman may have prematurely taken up slack or both might have occurred. The District Court found that one or both were the cause of the accident.

Since both the District Court and the Court of Appeals for the Second Circuit originally approached the legal problems herein from the viewpoint that operational negligence gave rise to liability for unseaworthiness, neither was then concerned with more detailed findings and no further factual findings have been made.

The District Court also rejected petitioner's claims that the skid or temporary landing platform was an appurtenance of the vessel and thus unseaworthy for various reasons.

The Court of Appeals, with a modification not in issue, affirmed.

The shipowner petitioned for a writ of certiorari and this Court, 401 U.S. 930, granted the writ stating:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case

is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the opinion of this Court in *Usner v. Luckenback Overseas Corp.*, 400 U.S. 494, decided January 25, 1971. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan dissent."

On remand the Court of Appeals directed the parties "to submit additional briefs in the light of *Usner v. Luckenbach Overseas Corp...*," and then rendered its decision, 446 F. 2d 1375, without apparently considering the differences between this case and *Usner, supra*, and without considering all the bases of liability for unseaworthiness set forth therein.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I

When this Honorable Court granted the petition for certiorari herein, 401 U.S. 930, vacated the judgment and remanded this case to the United States Court of Appeals for the Second Circuit for further consideration in light of *Usner, supra*, it is submitted that this Court saw that there were sufficient grounds present in the instant case to either award petitioner judgment in his favor on the basis of *Usner, supra*, or

to remand the case to the District Court for further findings. This Court could have directed the Second Circuit to dismiss the complaint on remand. It did not, for good reason, and it is urged that on remand the Second Circuit failed to consider the matters raised in *Usner, supra* and improperly remanded this case to the District Court with a direction to dismiss the complaint.

This Court should correct the situation and further direct the Court of Appeals for the Second Circuit to consider the matters raised in *Usner, supra*, and, if necessary, direct the District Court to conduct further proceedings in accordance with the guidelines established.

In further defining the elements of unseaworthiness in its decision in *Usner, supra*, this Court set forth the guidelines to be considered in deciding whether unseaworthiness exists and petitioner asks that this Court resolve the dispute herein over the interpretation of *Usner*, before that decision creates a series of conflicts of interpretation as great as the uncertainty it sought to correct.

II

Petitioner further submits that the present lack of harmony among the Circuits, on the question of how far the vessel's warranty of seaworthiness extends to shore based equipment being used as an

appurtenance of the vessel in loading or discharging, is so pronounced and so fundamental as to jeopardize the effective administration of justice. The wide difference between the positions of the Second Circuit on the one hand and the Third, Fifth and Ninth Circuits on the other beg for the intervention of this Court in effecting a resolution of the conflict of how far this Court's holding in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963) should extend.

This Court has already sought to resolve the above conflict by granting certiorari, 401 U.S. 936, of a decision of the Fifth Circuit, Court of Appeals, *Law v. Victory Carriers, Inc.*, 432 F. 2d 376 (5 Cir. 1970) and setting the case down for oral argument during the second week of October, 1971 Term of this Court. The decision is pending.

Lacking a definitive pronouncement from this Court the differences between the Circuits can only increase and the disparity of treatment accorded a longshoreman depending on where he is injured becomes more unjust each day. There is no reason why a longshoreman injured in a West Coast or Gulf Coast port or in certain East Coast ports should recover verdicts when under the same circumstances longshoremen in other ports are denied recovery.

The issue is of broad importance both in terms of the number of accidents involved and the economic impact it has on longshoremen and the shipping industry

in general, so in line with this Court's disposition of the issues in *Law v. Victory Carriers, Inc., supra,* this Court should also resolve the issues presented here.

ARGUMENT

POINT I

THE VESSEL HEREIN WAS UNSEAWORTHY AS MEASURED BY THE STANDARDS OF THIS COURT'S DECISION IN *USNER V. LUCKENBACH OVERSEAS CORP.*

a) IF NOT CLEARLY UNSEAWORTHY AS A MATTER OF LAW, THE CASE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT TO CONSIDER VARIOUS FACTUAL BASES OF LIABILITY AS DELINEATED IN *USNER V. LUCKENBACH OVERSEAS CORP.*

It is submitted that this Court further defined the meaning of unseaworthiness in its opinion in *Usner, supra,* by emphasizing unseaworthiness as a condition. The meaning of the word "condition" in the context of the opinion appears to be equivalent to a state of being, or a state of affairs. Using *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, as an example, this Court pointed out the distinction between negligence and unseaworthiness. While treating the liability for negligence as wholly

distinct from liability for unseaworthiness, this Court recognized certain relationships between the two concepts.

For example, it clearly recognized that unseaworthiness may arise out of negligent conduct. It may likewise arise out of non-negligent conduct, but if unseaworthiness, the condition is found, it is irrelevant as to how the condition arose (whether due to negligent or non-negligent conduct). If there is unseaworthiness, the shipowner is liable for personal injuries arising therefrom.

This Court also cited *Mitchell v. Trawler Racer, Inc., supra,* in pointing out that unseaworthiness need not be a longstanding condition. If there is an unsafe condition, its age or duration appears as irrelevant as the manner of its creation.

In citing and discussing *Mascuilli v. United States,* 387 U.S. 237, it is submitted that this Court was also pointing out that the rapidity with which the condition may come into being is likewise irrelevant. *Crumady v. The J. H. Fisser,* 358 U.S. 423 is also cited as an instance of an unseaworthy condition (a transitory condition) suddenly brought into play. If unseaworthiness can be transitory, it can also be created suddenly and instantly.

We urge that every test laid down in the foregoing analysis of *Usner, supra,* is met in the instant case.

A wire loop on the end of a sling dropped into a space of approximately 2 to 3 inches between the skid and the pier loft. The trial judge so found and this finding has never been disturbed. The unseaworthy condition, the unsafe state of being that then and there existed is that the loop was in a dangerous location; once having entered the space between the skid and the dock, the loop could not be extracted without danger, and when the winches pulled on the sling, the loop end of which was caught between the skid and the pier, the skid was dislodged from the pier loft, causing petitioner's injuries. The sling with the loop at the end was of course an appurtenance of the vessel and thus no question arises as to whether or not unseaworthiness emanating therefrom is chargeable to the vessel.

In the above analysis, the "condition" was created; it was not a long standing condition; the "condition" was unsafe; the skid was suddenly dislodged from the loft; the unsafe and unseaworthy "condition" was suddenly brought into play when the winches pulled on the sling, causing the accident.

According to this analysis, petitioner is entitled to judgment in his favor having met all the requirements set down in *Usner supra*, relating to liability for unseaworthiness.

If the Second Circuit Court of Appeals on remand did any such analysis, it does not appear in its opinion which is devoid

of any mention of the above matters. Consequently, it is important that this Court grant certiorari to resolve the apparent conflict between its decision in *Usner, supra*, the decision of the Second Circuit (1a), and the decisions of the Fifth Circuit in *Aguirre v. Citizens Casualty Company*, 441 F. 2d 141 (5 Cir. 1971), decided March 26, 1971 and the Ninth Circuit in *Ryan v. Pacific Coast Shipping Co., Liberia*, 448 F. 2d 525 (9 Cir. 1971), decided September 8, 1971.

Since the District Court and the Court of Appeals in its original decision approached the case from the viewpoint that operational negligence was present and gave rise to liability for unseaworthiness they were understandably not concerned with more detailed findings. For example, the record is bare as to a number of matters referred to above. There is no proof as to the number of winchmen involved in the handling of the cargo fall*, whether one or more; no proof as to where the winch controls were located; whether if one winchman operated more than one winch, he could do so with reasonable safety; whether a signal system was in use or should have been; whether if no such system was used the winchman or winchmen could adequately see the physical objects involved in the discharge, such as the platform and the space between it and the pier; in short, whether a safe method

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* See *Aguirre, supra*.

of discharge was employed. See *Ryan, supra.*

This Court in *Usner, supra,* obviously thought some of the above factors were important when it stated:

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo or the manner of its stowage, might be improper. For any of these reasons or others, a vessel might not be reasonably fit for her intended service."

The record below should be developed to include these above stated factual matters, since any one of them might have been the source of a condition of unseaworthiness and they are recognized in the *Usner* case as circumstances from which a "condition" of unseaworthiness might arise independently of considerations regarding the unseaworthy condition created by the loop dropped into the space between the loft and the pier.

Accordingly, petitioner urges that further proceedings be directed toward these inquiries, in the event that this Court does not find as contended herein, that liability for unseaworthiness has already been amply demonstrated. In that event, petitioner urges that the court below be directed to enter judgment for the petitioner.

II

THE WARRANTY OF SEAWORTHINESS SHOULD BE EXTENDED TO THE LOFT SKID OR TEMPORARY LANDING PLATFORM

The District Court and the Court of Appeals for the Second Circuit below relied on the Second Circuit cases of *Fredericks v. American Export Lines*, 227 F. 2d 450 (2 Cir. 1965) cert. den. 350 U.S. 989 and *Forkin v. Furness Withy & Co.*, 323 F. 2d 638 (2 Cir. 1963) which, it is submitted, incorrectly put too much reliance on the fact that the equipment involved in the accident was owned by the stevedore and attached to the pier.

These holdings of the Second Circuit are in direct conflict with the three leading cases of *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir. 1965) cert. den. 382 U.S. 938 (1965) where a hopper located on the pier was used to temporarily hold cargo before it was dumped into a truck to be removed; in *Deffes v. Federal Barge Lines, Inc.*, 361 F. 2d 422 (5 Cir. 1962), cert. den. 385 U.S. 969 (1960) and *Huff v. Matson Navigation Co.* 338 F. 2d 205 (9 Cir. 1964) cert den. 380 U.S. 943 (1965) where a land based crane with a conveyor (marine leg) was used to take bulk cargo from the vessel and transport it to some storage area. In all three cited cases, the equipment was affixed to the pier and owned by the stevedore, but nevertheless the warranty of seaworthiness was extended to include this equipment. These holdings are in direct

conflict with the facts herein, since the skid or temporary landing platform was affixed to the pier and owned by the stevedore.

In interpreting *Gutierrez v. Waterman S.S. Corp.*, *supra*, the prevailing and it is submitted, the correct, view in the Third, Fifth and Ninth Circuits (also noted with approval in the Fourth Circuit) is that the site of the accident or where it occurred is not as important as whether the longshoreman was injured in the process of loading or discharging the vessel. The leading cases are *Thompson v. Calmar S.S. Corp.*, 331 F. 2d 657 (3 Cir. 1964), cert. den. 379 U.S. 913 (1964); *Spann v. Lauritzen*, *supra*; *Sanderlin v. Old Dominion Steve. Corp.*, 385 F 2d 79 (4 Cir. 1967) *Deffes v. Federal Barge Lines, Inc.*, *supra*; *Chagois v. Lykes Bros. Steamship Company*, 432 F. 2d 388 (5 Cir. 1970); *Huff v. Matson Navigation Co.*, *supra*; and *Gebhard v. S.S. Hawaiian Legislator*, 425 F. 2d 1303 (9 Cir. 1970). The above view also conflicts with the instant case since the Second Circuit does not seem to consider it important that the injured longshoreman was involved in loading or discharging the vessel at the time of his injury.

The instant case also meets the test of whether the appurtenance or equipment involved (here the skid or temporary landing platform) was "...an essential part of the unloading process". *Spann*, *supra* 344 F. 2d at p. 209; *Law v. Victory Carriers, Inc.*, *supra*.

The cargo or drafts of plywood being discharged herein could not be landed safely, if at all, in the pier loft without the use of the skid or platform, so it was an essential part of the unloading process and thus an appurtenance of the vessel in its discharge operation.

Further cases could be cited to show the continuing conflict between the Circuits but the above cases should be sufficient to point up the conflict and to direct this Court's attention to the restrictive interpretation of *Gutierrez, supra* by the Second Circuit which has produced the conflict.

In summary, petitioner asks that this Court resolve the conflict among the various Circuits and define the standards to be applied in extending the warranty of seaworthiness to shore based equipment being used to load or discharge a vessel.

CONCLUSION

The judgment of the Court of Appeals should be set aside and judgment should be entered in favor of petitioner or this case should be remanded to the District Court for further findings.

Respectfully submitted,

Donald Sherwood
401 Broadway
New York, New York
Counsel for Petitioner

APPENDIX 1

Decision of Court of Appeals
dated August 12, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 945 - September Term, 1970.

(On remand from the Supreme Court of the United States, March 31, 1971
Decided August 12, 1971.)

Docket No. 35391

MARIO TARABOCCHIA,

Plaintiff-Appellee-Appellant,

-against-

JOHN W. McGRATH CORP.,

Third Party Defendant.

BEFORE:

MOORE, HAYS and ANDERSON,
Circuit Judges.

Upon remand by the United States Supreme Court which vacated the judgment in favor of plaintiff and directed further consideration in the light of *Usner*

APPENDIX 1

Decision of Court of Appeals
dated August 12, 1971

v. Luckenbach Overseas Corp., 400 U.S. 494 (1971), case remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

GEORGE T. DELANEY, New York, N. Y. (Kenneth Heller, New York, N. Y.), for Plaintiff-Appellee-Appellant.

MARTIN J. McHUGH, New York, N. Y. (McHugh & Leonard, New York, N. Y.), for Defendant and Third-Party Plaintiff-Appellant-Appellee.

Per Curiam:

Plaintiff, an employee of John W. McGrath Corp., stevedores, was injured while engaged in an unloading operation from the M/V Beersheva, a vessel owned by Zim Israel Navigation Co. The accident occurred when a loading platform on which plaintiff and a co-worker were standing suddenly became dislodged causing plaintiff to fall. The Trial Court found that the platform was not an appurtenance of the vessel and that the cargo sling being used in the unloading operation did not render the vessel unseaworthy. Liability was premised upon the

APPENDIX 1

Decision of Court of Appeals dated August 12, 1971

theory that an act of plaintiff's co-worker caused the accident and that "a ship is rendered unseaworthy when longshoremen make negligent use of seaworthy equipment." 297 F. Supp. 378, 382. Judgment was entered in favor of plaintiff against Zim Israel and McGrath did not dispute its indemnity obligation.

Despite the seeming incongruity of holding that a seaworthy vessel can be instantaneously transformed into an unseaworthy condition by a negligent act of a stevedore's employee, this court felt bound by previous decisions of the Supreme Court[1] and its own decisions in reliance thereon[2] to affirm the judgment. At the

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1 *Mascuilli v. United States*, 387 U.S. 207; *Waldron v. Moore-McCormack Lines*, 380 U.S. 724; *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206; *Mitchell v. Trawler Racer*, 362 U.S. 539; *Crumady v. The J. H. Fisser*, 358 U.S. 423; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96.

2 *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961, *rehearing denied*, 386 F.2d 444, *cert. den.* 390 U.S. 1027; *Alexander v. Bethlehem Steel Corporation*, 382 F.2d 963.

APPENDIX 1

Decision of Court of Appeals
dated August 12, 1971

same time the court recognized that conflict existed between the Circuits. (the Fifth[3] and the Ninth[4]) but said that it was for the Supreme Court "to resolve the apparent conflict between the Circuits." 417 F.2d 476,478.

This resolution has now been made by the Supreme Court in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (January 25, 1971) but not without vigorous dissent by four Justices thereof. 400 U.S. at 501-504. The majority opinion reviewed the many cases which over the years have created the problem and came to the conclusion that it would be erroneous "where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence." 400 U.S. at 500.

Upon Zim Israel's petition, certiorari was granted (four Justices dissenting), the judgment vacated and

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3 *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 443, *cert. den.* 389 U.S. 869; *Robichaux v. Kerr McGee Oil Industries, Inc.*, 376 F.2d 447.

4 *Tim v. American President Lines, Ltd.*, 409 F.2d 385 and cases cited therein.

APPENDIX 1

Decision of Court of Appeals
dated August 12, 1971

the case was remanded "for further consideration in the light of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, decided January 25, 1971." 401 U.S. 930 (March 31, 1971). Such consideration has now been given in the light of that decision and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint.

APPENDIX II

Judgment of Court of Appeals
dated August 12, 1971

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of August, one thousand nine hundred and seventy-one.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,

Circuit Judges

MARIO TARABOCCHIA,
Plaintiff-Appellant,

v.

MEDITERRANIAN AGENCIES INC., AMERICAN-ISRAELI SHIPPING CO. INC., and ZIM-ISRAEL NAVIGATION CO. LTD.,
Defendant and Third-Party Plaintiff

ZIM ISRAEL NAVIGATION CO. LTD.
Defendant and Third-Party Plaintiff-Appellant,

JOHN W. McGRATH CORPORATION,
Third Party Defendant.

APPENDIX II

Judgment of Court of Appeals
dated August 12, 1971

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the action be and it hereby is remanded to said District Court with instructions to dismiss the complaint in accordance with the opinion of this court, with costs to be taxed against the plaintiff-appellant Mario Tarabocchia.

s/ A. Daniel Fusaro
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. ~~1078~~ 71-755

MARIO TARABOCCHIA,

Plaintiff,

against

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN J. McHUGH,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 1078

MARIO TARABOCCHIA,

Plaintiff,

against

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Zim Israel Navigation Co., Ltd., responding to the Petition for a Writ of Certiorari, respectfully asks this Court to deny the Petition.

Opinions of the Courts Below

The Opinion of the United States District Court for the Southern District of New York is reported at 297 F.Supp. 378. The Court of Appeals for the Second Circuit affirmed the District Court's findings (with a modification not pertinent here) and its Opinion is reported at 417 F.2d 476. The prior decision of this Court (which, *inter alia,* remanded the case to the Court of Appeals) is to be found at 401 US 930. The Opinion of the Court of Appeals, subsequent to the remand, is set forth at 446 F.2d 1375.

Jurisdiction

The jurisdiction of this Court is conceded.[1]

Questions Presented

1. May a plaintiff invoke the maritime doctrine of unseaworthiness when his accident has been caused solely by the negligence of his fellow longshoremen?

2. Should the maritime doctrine of seaworthiness be extended to a structure attached to and a functional part of a pier?

Statement of the Case

The facts of this matter are detailed at length in the Opinion of the District Court (297 F.Supp. 378).

Reasons for Denying the Petition for a Writ of Certiorari

The Respondent submits that the Court of Appeals properly complied with the instructions of this Court in directing a dismissal of plaintiff's complaint. The applicable law, governing accidents of this sort, is clearly set forth in the decision of this Court in *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494.

Petitioner seeks herein to have this Court resolve (what Petitioner contends to be) a conflict among the Circuits. Petitioner avers that this conflict was submitted to this Court for resolution in *Law* v. *Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376. Since the filing of the instant

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[1] Save for the objections raised *infra* (f'tnte 4, p. 10) that Petitioner, on the state of the record, lacks standing to raise certain of the issues contained in his Petition.

Petition, this Court has decided the *Law* case (40 Law Week 4059) in a manner which completely vitiates Petitioner's assertions.

ARGUMENT

POINT I

Negligence, however labeled, is not synonymous with unseaworthiness.

Petitioner's Brief (p. 13) quotes language from the Opinion in *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494, which lists a brief summary of various conditions under which a vessel might be held to be unseaworthy.

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo or the manner of its stowage, might be improper. For any of these reasons or others, a vessel might not be reasonably fit for her intended service."

The Brief next proceeds to assume a number of conditions which, Petitioner asserts, would have rendered the BEERSHEVA unseaworthy in accordance with the criteria set forth in *Usner*.[2]

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[2] The circumstances hypothesized by Petitioner (Brief, p. 12) are (1) an inadequate number of winchmen in handling the cargo fall; (2) Improper placement of the winch controls; (3) the possibility that the winchman was unsafely operating more than one control; (4) the possibility that no signal system existed or that an inadequate one was being used; and (5) the possibility that the winchman or (winchmen) could not see the objects which were involved in the discharge. These suppositions, advanced for the first time by Petitioner upon this Petition for Certiorari, will be collectively referred to as the New Claims of Unseaworthiness.

It is then argued by Petitioner that the opinion of the Second Circuit Court of Appeals, upon remand from this court, is "devoid of any mention of the above matters." This, avers Petitioner, constituted a failure on the part of the Second Circuit to comply with the requirements of the remand, in that the Second Circuit Court rendered its decision "without considering all the bases of liability for unseaworthiness set forth therein (i.e., in *Usner*)" (Petitioner's Brief, p. 6).

We will prescind momentarily from a consideration of whether or not these hypothesized circumstances (The New Claims of Unseaworthiness) would indeed support the legal conclusion Petitioner now urges. Instead, Respondent respectfully submits that any finding of unseaworthiness posited on a claim of an inadequate number of winchmen, or the lack of winch controls, or whether or not a signal system was in use, etc.—(cf. Petitioner's Brief, p. 12), would, in the light of the judicial history of this suit, have been completely improper whether made by the District Court or by the Circuit Court.

The claims made on Petitioner's behalf by his counsel in the opening to the court were four-fold:

> "Now, we claim, one, that the skid was secured with some old pieces of manila line at the inboard corners.
>
> The Court: I read the memoranda on that, of course. Do you claim that the manila rope was defective as rope or just that it was not sufficient for this particular purpose?
>
> Mr. Heller: That's right, it was not adequate for the purpose for which it was intended, to hold this thing from being carried away.
>
> * * *
>
> Also we claim that there was a space between the skid and the dock proper or the platform and the dock

which permitted this piece of equipment to fall in between.

* * *

We also claim that the cargo sling, that is, the cargo sling used by the men, was improper for this job in that the eye or the loop on it was made by a swaging or collar device which was prone to hang up when being used in this type of operation, hang up and get caught while being dragged or falling. That is three.

* * *

In addition, we claim that the safety net which connected the skid with the ship was not drawn all the way underneath the skid. There was adequate length of safety net to draw underneath the pier." (Pp. 26a-27a Appendix to plaintiff-appellees-appellant's Brief in the Court of Appeals).

Absolutely no contentions of the types set forth on pp. 12-13 of Petitioner's present Brief (The New Claims of Unseaworthiness) were advanced during the course of the trial of this matter.

Furthermore, the record of the trial is unrelievedly barren of even the slightest scintilla of evidence to support these new contentions which Petitioner, for the first time in the entire course of this litigation, now seeks to urge to this Court. Respondent need not rely on its own assertion, nor even indeed on citation to the record. The fact is that Petitioner's Brief candidly concedes that the ". . . record is bare as to a number of matters referred to above" and that "(t)here is no proof . . ." (Petitioner's Brief, p. 12) as to the various innovations we have labeled The New Claims of Unseaworthiness.

What Petitioner now seeks is nothing less than an entirely new trial with an untrammeled option to introduce whatever novel flights of fancy may occur to a litigant who has already had far more than his day in court.

Of course, the complete lack of merit in any such suggestions is only underscored by the equally complete lack of reference by Petitioner to these new matters on the original trial of the action for the District Court. Fortunately, the law protects litigants from having to endure an indefinite series of second, third and fourth contestings of the same lawsuit. Petitioner cannot now be heard to assert that he had available, but did not use, other contentions and other evidence. Petitioner's failure precludes the right to maintain subsequent actions based on asserted positions which he might have taken, but did not. *Cromwell* v. *County of Sac*, 94 US 351, 352; *Commissioner of Internal Revenue* v. *Sunnen*, 333 US 591, 597; *Chicot County Drainage District* v. *Baxter State Bank*, 308 US 371, 375; *M.E. Heiser* v. *Woodruff*, 327 US 726, 735, 736.

Petitioner doubtless realizes the impact of this rule of law. In an attempt to excuse its consequences, Petitioner's Brief strongly implies that Petitioner learned, from the teaching of *Usner*, that those novel contentions he now seeks to make, would be considered unseaworthiness by this Court. Thus, hints Petitioner, he should be accorded another chance in view of what he would say was a novel reworking of the law of unseaworthiness by this Court in *Usner*.

The difficulty with this implied argument is that it is not true. In listing defective gear, unrepaired appurtenances, an unfit crew, an inadequate number of workers, the method of loading cargo or the manner of its stowage, as recognized conditions of unseaworthiness, Mr. Justice Stewart clearly cited existing precedent for each of those hypotheses. Had Petitioner truly desired to assert claims of unseaworthiness of the type recited in the Opinion of Mr. Justice Stewart, he had only to look to existing and well-recognized principles. *Usner* reiterated the principle that negligence, *per se*, is not unseaworthiness. It did not alter or expand at all familiar concepts of what is unseaworthiness.

With regard to those allegations which Petitioner *did* in fact make, the care with which the District Court shaped its opinion discloses the lack of merit in Petitioner's present position. Since the Petitioner had claimed that the skid was a component of the vessel and that the warranty of seaworthiness applied to the skid as well as to the cargo slings, the Trial Court was, perforce, compelled to deal with these two components of the unloading operation. Specific findings were thus made disposing of Petitioner's contentions (made on trial) in respect to the skid (and its appurtenances) and the cargo slings.

The Trial Court expressly found that neither the skid nor any of its appurtenances (the steel shoe, the manila rope, etc.) were so bound up with the ship as to call into play the doctrine of seaworthiness (297 F.Supp. at p. 381). On the other hand, the slings (held by the Court to be an appurtenance of the ship and thus within the reach of the seaworthiness doctrine) were found to have been physically safe, fit and proper for the job at hand (297 F.Supp. at p. 382).

Whether the skid fell because of a condition whose duration is legally significant or whether the same act embraced both negligence and fall, is of no importance now.[3] What is important is that the skid cannot be treated as an appurtenance of the vessel; the sole cause of the happening of this accident was the negligence of one of the Petitioner's co-workers. That negligence cannot be transmutted by semantic prestidigitation into unseaworthiness.

In *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494, —— 27 L.Ed. 2d 562, 567, this Court said:

> "What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo or her crew, but the

[3] Respondent is in total disagreement with Petitioner's contention that the instantaneous pulling away of the skid rendered the skid unseaworthy, but in the posture of this case, it is unnecessary to engage in any philosophical conjecturings or to draw any metaphysical distinctions between an event and a condition.

> isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions. In *Trawler Racer,* supra, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed."

Here, too, the findings of the district court clearly indicate that it was negligence, and only negligence, which caused Petitioner's accident. The law is now clear that negligence and unseaworthiness may not be equated by simply selecting an advantageous label.

POINT II

Maritime law does not apply to a shore connected appurtenance.

Petitioner urges, in Point II, that the warranty of seaworthiness should be brought ashore, i.e., that the skid, being a functional part of the unloading process, should be deemed so much a part of the vessel so as to call into play the warranty of seaworthiness.

When this argument was made by Petitioner to the District Court, it was rejected. The trial court held, citing *Fredericks* v. *American Export Lines,* 2 Cir. 1955, 227 F.2d 450, that a skid (or landing platform attached to the pier) was not a part of the ship within the apprehension of the maritime doctrine of seaworthiness. The trial court

also referred to a very analogous decision in *Penoro* v. *Rederi A/B Disa*, 2 Cir., 1970, 422 F.2d 392.

See also, *Forkin* v. *Furness Withy*, 2 Cir., 1963, 323 F.2d 638.

This finding was undisturbed by the Court of Appeals.

Petitioner now challenges the concept that pier connected equipment should not be deemed a part of the vessel so as to call into play the maritime doctrine of seaworthiness. He adverts to conflicting decisions in various of the Circuit Courts, deplores the disagreement between the Circuits and notes that the question should be resolved by the decision of this Court in the (then) pending case of *Law* v. *Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376.

Whatever conflict existed between the Circuits on this question has, indeed, now being resolved by this Court. This decision in the *Law* case has been rendered and clearly holds, contrary to Petitioner's arguments:

> "In part, this differential treatment stems from the geographical and historical accident that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable water are generally governed by federal maritime law. These two bodies of law do overlap and interpenetrate in some situations, and the amphibious nature of the longshoreman's occupation creates frequent taxonomic problems. In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: respondent Law was not injured by equipment which was part of the ship's usual gear or which was stored on board, the equipment which injured him was in no way attached to the ship, the fork lift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank. Affirmance of the decision below would raise a host of new problems as to the standards for and limitations of the applicabil-

ity of maritime law to accidents on land. At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Law* v. *Victory Carriers, Inc.* (Sub. Nom. *Victory Carriers, Inc.* v. *Law*), 40 L. Week 4059, 4063.

Further elaboration is neither necessary nor useful.[4] It has now been decided that the shoreward advance of the unseaworthiness doctrine has been checked and that the ship and the gangway represent the outermost perimeters of its applicability.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4]Respondent feels it desirable to mention that Petitioner may well be without standing at all to here raise a claim that the skid was part of the vessel even if the *Law* case had been decided otherwise. When Respondent appealed to the Court of Appeals from the decision of the trial court, Petitioner cross-appealed from so much of the district court's opinion as held that the skid was not an appurtenance of the vessel. Respondent, after the Court of Appeals had affirmed the District Court petitioned for Certiorari, Significantly, though Petitioner had previously cross-appealed to the Court of Appeals, he did not then cross-petition with respect to the issue of the skids being part of the vessel.

By familiar law, a failure to preserve an assignment of error on appeal precludes the defaulting party from urging any subsequent consideration of that point in later Appellate proceedings. *Chicago & Eastern Illinois Railroad Company* v. *Southern Railroad Company*, 7 Cir., 1958, 261 F.2d 394, 402; *Haynes* v. *United States, U.S. Court of Claims*, 1969, 418 F.2d 1380, 1382; *Hildreth* v. *Union News Company*, 6 Cir. 1963, 315 F.2d 548, 550.